UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROYAL OAK ENTERTAINMENT, L.L.C.
a Michigan limited liability company,
MURRAY HODGSON, ROYAL OAK,
THEATRE, L.L.C., a Michigan limited
liability company, PETER HENDRICKSON,

Plaintiffs,

Civil No. 04-72728
Hon. John Feikens

v.

CITY OF ROYAL OAK, MICHIGAN,
JAMES MARCINKOWSKI, CHARLES
SEMCHENA, DONALD FOSTER, T.J.
BERRINGTON, TERRY DRINKWINE,
MICHAEL ANDRZEJAK, CARLO GINOTTI,
ILENE LANFEAR and JEANNE SARNACKI
and individually and in their official capacities,
jointly and severally,

Defendants.

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OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' FEDERAL CLAIMS

Plaintiffs bring a variety of federal and state claims against Defendants in an action arising out of Plaintiffs' submission to the City of Royal Oak of several Plans of Operation for a theater in downtown Royal Oak, Michigan. In addition to three state claims, Plaintiffs allege the following federal claims: (i)

(Count I) violation of 42 U.S.C. § 1983; (ii) (Count II) violation of 42 U.S.C. § 1985(3); (iii) (Count III) violation of 42 U.S.C. § 1986; and (iv) (Count VII) violation of 42 U.S.C. § 1961, 1962 (RICO). Defendants filed a motion to dismiss Plaintiffs' federal claims. On January 5, 2005, pursuant to Fed. R. Civ. P. 12(b)(6); this Court converted Defendants' motion to a Motion for Summary Judgment on Plaintiffs' federal claims. For the reasons below, I GRANT Defendants' motion for summary judgment on those federal claims.

I. FACTUAL BACKGROUND

1. Summary of the Facts

I discuss the larger context of this dispute before explaining the case's detailed facts, because the facts are complicated. I summarize the general contours of the situation setting forth a more detailed explanation of the facts.

Nobody in Particular Presents ("NIPP") owned the Royal Oak Music Theater (the "Theater"), a property in the City of Royal Oak. NIPP also owned a liquor license with Sunday sales and a dance-entertainment permit. In the fall of 2002, Plaintiffs and NIPP began negotiations apparently for the transfer of the Theater and NIPP's various permits and licenses to Plaintiffs. Michigan law requires that the state and the municipality's Liquor Control Commission ("LCC") approve any transfer of a liquor license. Therefore, the parties entered into an agreement to grant Plaintiffs the control and the freedom to operate a business in NIPP's establishment and under NIPP's various licenses and permits while awaiting the state and the municipality's LCC's approval of the transfer of NIPP's liquor license to Plaintiffs.

The City of Royal Oak requires that the holder of a liquor license submit a Plan of Operation

for approval before operating a business where liquor is served. The City Commission grants or denies final approval of a Plan of Operation, with the advice of the City's LCC. Plaintiffs submitted seven Plans of Operation to the City's LCC. Plaintiffs submitted plans to the City, under various names, even after receiving the City Commission's approval of a prior Plan of Operation and, in other cases, before the City's LCC even acted upon the Plaintiffs' other previous application. Evidently, Plaintiffs were not solely satisfied in having received the City Commission's approval of a Plan of Operation before beginning operations. Plaintiffs appear to have wanted the City Commission's combined approval of a Plan of Operation, the transfer of a liquor license and the transfer or approval of a dance permit. The City Commission never granted all these approvals.

2. Detailed Facts

NIPP owned an interest in the Theater at 318 West Fourth Street in Royal Oak, Michigan. (Pl.s' Compl. ¶ 19.) In November 2000, NIPP received a liquor license, with Sunday sales and a dance-entertainment permit, for the Theater. (Pl.s' Compl. ¶¶ 17-18.) In November 2001, NIPP presented to the City of Royal Oak (the "City") a Plan of Operation[1] for the Theater; the City approved this plan. Id. at ¶ 18.

In the fall of 2002, Plaintiffs Murray Hodgson and Peter Hendrickson began negotiating with NIPP to purchase NIPP's interest in the Theater, including the Class C liquor license, the Sunday sales

[1] A Plan of Operation is a written document that outlines the proposed manner in which an establishment with a liquor license will be operated, "including, but not limited to, the format, schedule of the hours of operation, crowd control, security, alcohol management, use of the facilities, parking provisions, plan for interior use and layout, and any other pertinent information as requested by the City or City's [Liquor Control Commission] Committee." Royal Oak, Mich., Ordinance 2001-06 § A § 4.B.

permit and the dance permit. Id. at ¶ 19. On May 28, 2003, Plaintiffs submitted a Plan of Operation to the City ("Plan of Operation #1").[2] (Def.s' Mot. for Summ. J. at Ex. 6 (Plan of Operation #1).)

On June 12, 2003, Hodgson appeared before the City's LCC to discuss the proposed Plan of Operation #1. (Pl.s' Compl. ¶ 21.) Prior to the June 25, 2003, Plaintiffs submitted a new Plan of Operation ("Plan of Operation #2").[3] (Def.s' Mot. for Summ. J. at Ex. 9 ("Plan of Operation #2"). On June 25, 2003, the City's LCC held a hearing regarding Plaintiffs' Plan of Operation #2 and the hearing was continued on July 15, 2003. (Pl.s' Compl. at ¶ 24.) On July 15, 2003, at the City's LCC meeting, Hodgson claimed that he was before the City's LCC seeking authorization from the City to allow Royal Oak Theatre, LLC, to operate under NIPP's liquor license. Id. at ¶ 37. Hodgson stated that if NIPP's liquor license was transferred, it would be transferred to Royal Oak, Theatre, LLC, which was owned by Hendrickson. Id. at ¶ 37. Plaintiffs allege that the City did not permit Plaintiffs to speak about the Plan of Operation at this meeting. (Pl.s' Resp. at 7.) Even though they admitted that

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[2] Plaintiffs claim that "Murray Hodgson" proposed a Plan of Operation #1 pursuant to a management agreement between NIPP and Plaintiffs for the Theater. (Pl.s' Resp. at 2.) Plaintiffs' cite to a newspaper article to support this contention. Id. at 2. However, the Management Agreement that Plaintiffs' submitted with their Complaint was dated July 24, 2003, two months after Plaintiffs submitted Plan of Operation #1 to the City. (Pl.s' Compl. at Ex. 1 (Management Agreement) at 1.) Therefore, given that Plaintiffs have not produced any prior agreement, Plaintiffs could not have submitted Plan of Operation #1 pursuant to the Management Agreement. Plan of Operation #1 stated that"Murray Hodgson" doing business as "Royal Oak Music Theater," "on behalf of an entity to be formed," proposed Plan of Operation #1. Id. at Ex. 2 (Plan of Operation #1) at 1.

[3] Plaintiffs' proposed Plan of Operation #2, similar to Plan of Operation #1, was not submitted pursuant to a management agreement between NIPP and Plaintiffs for the Theater. Plaintiffs' Management Agreement was dated July 24, 2003, a month after Plaintiffs submitted Plan of Operation #2 to the City. (Pl.s' Compl. at Ex. 1 (Management Agreement) at 1.) Therefore, given that Plaintiffs have not produced any prior agreement, Plaintiffs could not have submitted Plan of Operation #2 pursuant to the Management Agreement.

Hodgson "discussed at length" the transfer of NIPP's liquor license to Plaintiffs and Plaintiffs' Plan of Operation #2. (Pl.s' Resp. at 7.) The City's LCC voted that the proposed Plan of Operation #2 be denied. (Pl.s' Compl. at ¶ 38.)

On July 24, 2003, Plaintiffs and NIPP signed a Management Agreement ("Management Agreement #1") granting Plaintiffs authority to operate and manage NIPP's business.[4] (Pl.s' Compl. Ex. 1 (Management Agreement #1) at 1.)

On August 4, 2003, the City Commission adopted two resolutions denying the May 28, 2003, Plan of Operation #2, based on the recommendation of the City's LCC. Id. at ¶ 41; Ex. 16. On August 18, 2003, Plaintiff Royal Oak Entertainment LLC submitted a Plan of Operation ("Plan of Operation #3") to the City. (Def.s' Mot. for Summ. J. at Ex. 15 (Letter Submitting Plan of Operation #3) and Ex. 16 (Plan of Operation #3).) On September 11, 2003, the City's LCC made no recommendation regarding Plan of Operation #3. Id. at Ex. 18 (City's LCC Minutes) at 2.) However, the City's LCC suggested that it address the transfer of NIPP's liquor license to Plaintiffs at its next meeting which was to be held on October 14, 2003. Id. at Ex. 18 (City's LCC Minutes) at 33.)

On October 3, 2003, Plaintiffs submitted another Plan of Operation ("Plan of Operation #4").

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[4] The Management Agreement provided Plaintiff Royal Oak Entertainment LLC with authority to manage and operate NIPP's business until the Michigan LCC issued a liquor license to Plaintiff. (Pl.s' Compl. Ex. 1 (Management Agreement #1) at 1.) This agreement was signed contemporaneously with a negotiations to purchase NIPP's business. (Pl.s' Compl. ¶ 19.) Apparently, Plaintiffs intended to operate the theater under this Management Agreement so that Plaintiffs could use NIPP's liquor license while awaiting approval of the transfer of NIPP's liquor license to Plaintiffs. Upon the Michigan LCC's approval of the transfer, the Management Agreement would terminate, apparently because Plaintiffs could then operate their business using their own liquor license. Id. at Ex. 1 (Management Agreement #1) at 1.

(Def.s' Mot. for Summ. J. at Ex. 19 (Plan of Operation #4).) On October 8, 2003, Plaintiffs submitted another Plan of Operation ("Plan of Operation #5") (Def.s' Mot. for Summ. J. at Ex. 20 (Plan of Operation #5).) On October 14, 2003, the City's LCC approved Plan of Operation #4. Id. at Ex. 21 (City's LCC Minutes) at 9.)

On October 29, 2003, despite the City's LCC's prior approval of Plan of Operation #4, Plaintiffs submitted yet another Plan of Operation ("Plan of Operation #6").[5] Id. at at Ex. 22 (Plan of Operation #6). On November 6, 2003, the City's LCC reviewed and approved Plan of Operation #6. Id. at Ex. 23 (City's LCC Minutes) at 5. The City's LCC also recommended approval of the transfer of NIPP's liquor license and entertainment permit, but denial of a dance permit. Id. at Ex. 23 at 5. On November 10, 2003, the City Commission adopted the City's LCC's recommendations. Id. at Ex. 24 (City Clerk's Certification).

On November 17, 2003, Plaintiffs submitted yet another Plan of Operation ("Plan of Operation #7"). Id. at Ex. 25 (Plan of Operation #7). On November 17, 2003, the City Commission approved Plan of Operation #7. Id. at Ex. 26 (City Clerk's Certification). In March 2004, the City Commission voted to advise the Michigan LCC that the City objected to the renewal of the license that was

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[5] In the seven different Plans of Operation and accompanying letters neither Plaintiffs nor their attorneys clarify on what grounds the parties are properly before the City's LCC. (Def.s' Mot. for Summ. J. at Ex. 6, 9, 16, 19, 20, 22, 25 (Plans of Operation #1-#7).) Additionally, the Plans of Operations are inconsistent; nearly every plan is different as to the business who is presenting the plan of operation and the business name under which that particular party is operating. Id. at Ex. 6, 9, 16, 19, 20, 22, 25.

Furthermore, Plaintiffs do not explain: (i) why so many plans were submitted, (ii) why some plans were submitted before the City's LCC could act on a previously submitted plan; or (iii) why Plaintiffs continued to submit some plans even after receiving approval of a previously submitted plan.

transferred from NIPP to Plaintiff Hendrickson. (Pl.s' Compl. at ¶¶ 53-54.) The Michigan Liquor Control Commission never transferred the liquor license from NIPP to Hendrickson. Id. at ¶ 54.

II. ANALYSIS

A. Motion for Summary Judgment Standard

Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). A fact is material only if it might affect the outcome of the case under the governing law. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). The court must view the evidence and any inferences drawn from the evidence in a light most favorable to the nonmoving party. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (citations omitted), Redding v. St. Edward, 241 F.3d 530, 532 (6th Cir. 2001).

The burden on the moving party is satisfied where there is an absence of evidence to support the non-moving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). For a claim to survive a motion for summary judgment, the respondent must "do more than simply show that there is some metaphysical doubt as to the material facts." Further, "[w]here the record taken as a whole could not lead a rational trier of fact to find" for the respondent, the motion should be granted. The trial court has some discretion to determine whether the respondent's claim is plausible. Betkerur v. Aultman Hosp. Ass'n, 78 F.3d 1079, 1087 (6th Cir. 1996). See also, Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479-80 (6th Cir. 1989).

B. Plaintiffs' Standing to Sue

Defendants argue that Plaintiffs lack standing to bring their federal claims before this Court. (Def.s' Mot. for Summ. J. at 7.) Article III of the United States Constitution limits the jurisdiction of federal courts to justiciable "cases and controversies" identified by the doctrine of standing. Whitmore v. Arkansas, 495 U.S. 149, 155 (1990). See also Bennet v. Spear, 520 U.S. 154, 162 (1997); Lujan v. Defenders of Wildlife, 504 U.S. 555, 559 (1992). This Court must consider both constitutional limitations and prudential limitations to determine whether Plaintiffs have standing under Article III of the Constitution. MX Group, Inc. v. City of Covington, 293 F.3d 326, 332 (6th Cir. 2002); quoting Warth v. Seldin, 422 U.S. 490, 498 (1975).

To satisfy the constitutional requirements of Article III standing, a plaintiff must establish three elements:

> (1) that the plaintiff [has] suffered an 'injury in fact' – an invasion of a judicially cognizable interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) that there be a causal connection between the injury and the conduct complained of – the injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; and (3) that it be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Bennett, 520 U.S. at 167; citing Lujan 504 U.S. at 560-561; see also Doe v. Porter, 370 F.3d 558, 561 (6th Cir. 2004).

Plaintiffs allege that they have standing to bring this suit based on claimed injuries to their interests in both substantive and procedural due process. Plaintiffs appear to claim that the City's denial of Plaintiffs' Plan of Operation violated Plaintiffs' substantive due process rights in "the right to

operate in any way at [sic] [Royal Oak Music Theater][.]"[6] (Pl.s' Resp. at 16.) Plaintiffs also claim that they had a "property interest in the transfer of N[I]PP's liquor license" and that Defendants violated Plaintiffs' interest by providing the Michigan LCC with inaccurate information in an arbitrary and capricious manner. Id. at 17. Furthermore, Plaintiffs claim that they had a property interest in the transfer of NIPP's dance permit and that Defendants invaded this interest by denying the transfer of NIPP's dance permit to Plaintiffs. Id. at 17.

Plaintiffs also allege that on September 11, 2003, Defendants inappropriately adopted a resolution which violated Plaintiffs' procedural due process rights. (Apr. 12, 2005, Hearing Re: Def.s' Mot. for Summ. J.) Plaintiffs also claim an injury to their First Amendment rights. Id. at 23.

The Sixth Circuit has stated that a plaintiff who brings a substantive or procedural due process claim must identify a protected liberty or property interest under the Fourteenth Amendment. Wojcik v. City of Romulus, 257 F.3d 600, 609 (6th Cir. 2001); citing Mathews v. Eldridge, 424 U.S. 319, 332 (1976). That property interest must be grounded on a state law or rule. Wojcik, 257 F.3d at 609.

C. Analysis of Claims

1. Substantive Due Process

Plaintiffs claim that the City violated their substantive due process rights by injuring Plaintiffs' property interest in: (i) "the transfer of N[I]PP's liquor license[;]" and (ii) the transfer of NIPP's dance

[6] This argument is difficult to understand because the City did grant at least three of Plaintiffs' Plans of Operation, including Plaintiffs' Plans of Operation #4, #6 and #7, the last Plan of Operation that Plaintiffs submitted. (Def.s' Mot. for Summ. J. at Ex. 21, 24, 26.)

permit; and (iii) "the right to operate" the Theater. (Pl.s' Resp. at 16-17.)

a. Transfer of a Liquor License and a Dance Permit

Plaintiffs acknowledge they never owned the liquor license or the dance permit at issue. Plaintiffs' interests arising out of the liquor license are premised on NIPP's status as the liquor licensee. (Pl.s' Resp. at 12.) Plaintiffs also claim an interest in the dance permit premised on NIPP's status as the dance permitee. Id. at17. The Sixth Circuit has recognized that in Michigan only the holder of a liquor license has a recognized property interest. Wojcik, 257 F.3d at 609-10. In Wojcik, the Sixth Circuit held that a plaintiff cannot be said to hold a recognized property interest in a license or a permit, where the transfer of such a license or permit is subject to government approval.[7] 257 F.3d at 610. Furthermore, the Michigan Supreme Court held that "a license (liquor) is not property within the meaning of [...] due process[.]" Johnson v. Liquor Control Comm'n, 266 Mich. 682, 687 (Mich. 1934).

Based on the Wojcik reasoning, I hold that Plaintiffs did not have a recognized property interest in NIPP's dance permit or liquor license and therefore standing cannot be predicated on an injury involving either one.

b. Plaintiffs' Interest in "Operating" the Theater

Plaintiffs claim a protected property interest in "the right to operate" the Theater. (Pl.s' Resp.

[7] The Sixth Circuit stated that although liquor licenses are alienable, an individual has no constitutionally protected property interest before both the MLCC and the municipality approve the transfer of a license. Wojcik, 257 F.3d at 610-11. Based on the same reasoning, the Sixth Circuit found that an individual did not hold a recognized property interest in an entertainment permit. Id. at 611.

at 16.) Plaintiffs allege that Defendants invaded Plaintiffs' property interest in "the right to operate" the Theater by denying the approval of Plaintiffs' Plan of Operation.[8] Id. at 16. The Sixth Circuit has recognized one's "freedom to choose and pursue a career," is a protected liberty interest. Parate v. Isibor, 868 F.2d 821, 831 (6th Cir. 1989); citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923); citing also Wilkerson v. Johnson, 699 F.2d 325, 328 (6th Cir. 1983). There are two types of substantive due process violations: (1) "official acts that are unreasonable, arbitrary and cause a deprivation of a substantive right specified in the Constitution, or (2) official acts that 'may not take place no matter what procedural protections accompany them.'" Wilson v. Beebe, 770 F.2d 578, 583-86 (6th Cir. 1985)(citations omitted).

Plaintiffs appear to argue that Defendants's denials of Plaintiffs' Plans of Operations were "unreasonable, arbitrary and caused a deprivation of a substantive right[.]" See Wilson, 770 F.2d at 583-86. However, Plaintiffs do not show that their property "right to operate the Theater[,]" created through a Management Agreement with NIPP, granted Plaintiffs a property interest in the approval of a Plan of Operation. (Pl.s' Resp. at 16.) Plaintiffs believe that they had a protected interest in the approval of a Plan of Operation grounded in: (i) the city of Royal Oak's Liquor Control Ordinance; and (ii) a Management Agreement formed with NIPP. (Pl.s' Resp. at 11-12.) However, neither the

[8] Plaintiffs' argument is difficult to fully understand, because the City Commission approved Plaintiffs' Plans of Operation #4, #6 and #7, the last Plan of Operation that Plaintiffs submitted. (Def.s' Mot. for Summ. J. at Ex. 21, 24, 26.) Furthermore, Plaintiffs did not have a Management Agreement in effect before they filed Plan of Operation #1 or Plan of Operation #2, therefore, Plaintiffs argument, which is premised on a "right to operate[,]" does not apply to Plan of Operation #1 or Plan of Operation #2. (Pl.s' Compl. at Ex.1.) Thus, Plaintiffs' argument appears to only refer to Defendants' denial or inaction regarding Plans of Operation #3 and #5.

Ordinance nor the Management Agreement provide Plaintiffs with a protected interest on which standing can be premised in the approval of a Plan of Operation.

(i). Liquor Control Ordinance

Plaintiffs appear to claim that they had a protected property interest in the approval of a Plan of Operation arising out the City of Royal Oak's Liquor Control Ordinance. (Pl.s' Resp. at 11.) The purpose of the Liquor Control Ordinance (the "Ordinance") is to establish a policy for issuing and transferring liquor licenses and "for the enforcement of liquor laws [...] and to limit the number of liquor licenses [...]." Royal Oak, Mich., Ordinance 2001-06 § A § 2. The Ordinance's licensing policy explains "[n]ew licenses or permits, transfer of existing licenses, transfers into the City of new licenses, and relocation or expansion of an existing licensed establishment, will be approved at the sole discretion of the City Commission." Id. at § A § 3. The ordinance states that approved licensees must "operate in accordance with a Plan of Operation approved by the City Commission." Id. at § A § 4(A). The Ordinance does not permit a non-licensed party to submit a Plan of Operation, unless that non-licensed party is applying, "for a new license, [or] the transfer into the City of a new license [...]." Royal Oak, Mich., Ordinance 2001-06 at § A § 5. Plaintiffs claim rights based on this Ordinance.

Plaintiffs, however, are not seeking a new license or the transfer of a license into the City. Instead, Plaintiffs seek the transfer of a license which is already existing in the City. The Ordinance, in plain language, clearly distinguishes between two different types of transfers. Id. at § A §§ 3, 5; See People v. Al-Saiegh, 244 Mich. App. 391, 423-4 (Mich. Ct. App. 2001)(holding that in interpreting ordinances and statutes governing liquor terms are accorded their plain and ordinary meanings). The proper section governing this situation is § A § 3, not § A § 5. Royal Oak, Mich., Ordinance 2001-06.

Under § A § 3 a "transfer of ownership of existing licenses [...] will be approved at the sole discretion of the City Commission." Id. at § A § 3. The other section, § A § 5, grants authority to the current holder of a liquor license, not a transferee, to submit the required Plan of Operation to the City. Royal Oak, Mich., Ordinance 2001-06 at § A § 5. Plaintiffs are not among the class of persons entitled to submit an application and Plan of Operation to the City. For this reason, standing cannot be predicated on an injury to Plaintiffs' right to submit or approval of a Plan of Operation.

(ii). Management Agreement

Finally, Plaintiffs claim a protected property interest in the approval of a Plan of Operation grounded in an interest in "a management agreement contract with N[I]PP to operate the Theater[.]" (Pl.s' Resp. at 12.) Plaintiffs claim that this Management Agreement allowed them to assert NIPP's rights before the City's LCC and the City's Commission, and therefore, before this Court.[9] Id. at 12.

However, Plaintiffs cannot assert the legal interests of NIPP to obtain standing. The United States Supreme Court, in Kowalski v. Tesmer, 125 S.Ct. 564, 567-8 (2004), stated that as a party "must assert his own legal rights and interests" rather than those of third parties. The Supreme Court has acknowledged three exceptions to this general rule: (1) when "a party asserting the right has a 'close' relationship with the person who possesses the right[;]" (2) where "there is a 'hindrance' to the possessor's ability to protect his own interests[;]" or (3) "when enforcement of the challenged restriction *against the litigant* would result indirectly in the violation of third parties' rights." Kowalski,

[9] Plaintiffs state "the undisputed facts show that [P]laintiffs clearly stated to [D]efendants at all times that they were submitting a revised plan of operation on behalf of N[I]PP as licensee[.]" Id. at 12.

125 S.Ct. at 567-8 (emphasis in the original).

The first and third exceptions to the general rule regarding third party standing might apply to Plaintiffs' case. However, Plaintiffs do not fall within either exception. Plaintiffs' contractual relationship with NIPP is not similar to those the Supreme Court has found sufficiently "close" to assert a third party's rights. See Caplin & Drysdale v. U.S., 491 U.S. 617, 624 n.3 (1989)(holding that a lawyer had standing to assert his client's rights); see also Griswold v. Connecticut, 381 U.S. 479 (1965)(holding that doctors had standing to raise the constitutional rights of patients with whom they had a professional relationship). Furthermore, NIPP has voluntarily chosen not to pursue any of its claims against Defendants. See Whitmore v. Arkansas, 495 U.S. 149 (1990)(death row inmate could not challenge the death penalty imposed on fellow inmate who voluntarily chose not to pursue his own claim). The third exception also does not apply because Plaintiffs have made no claim that Defendants have enforced any restriction against NIPP.

The Ordinance grants the licensee, NIPP, a "cognizable interest" in a process for approval of a Plan of Operation, but specifically excludes such an interest for Plaintiffs. A Management Agreement cannot create a right where state law excludes it. Therefore, only NIPP and not Plaintiffs has standing to sue for denial of a Plan of Operation where NIPP was the license holder. Plaintiffs have no recognizable property interest in the liquor license, dance permit or Plan of Operation, and thus lack standing to the bring their substantive due process claims.

Thus, I GRANT Defendants' motion for summary judgment on Plaintiffs' federal claims with respect to Plaintiffs' substantive due process claims.

2. Procedural Due Process Claim

Plaintiffs claim that Defendants violated Plaintiffs' procedural due process rights by adopting a resolution at the September 11, 2003, City LCC meeting.[10] (Apr. 12, 2005, Hearing Re: Def.s' Mot. for Summ. J.) Plaintiffs allege that Defendants adopted the resolution without allowing Plaintiffs to speak about one of the issues to which the resolution pertains. Id. Specifically, Plaintiffs' claim is that Defendants' resolution inappropriately denied Hodgson the right to operate at the Theater "in any way" although the hearing pertained only to a specific plan of operation.[11] Id.

Plaintiffs inappropriately misconstrue the nature of the resolution. Plaintiffs repeatedly misquote the resolution as denying Hodgson a right to operate the Theater "in any way," however, the resolution does not use this term. (Def.s' Mot. for Summ. J. at Ex. 18 (City LCC's Minutes 09/11/03) at 3.) To

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[10] That resolution states:

> BE IT RESOLVED that the Royal Oak LCC Committee minutes of July 15, 2003 are hereby approved with the following clarification and corrections:
>
> BE IT FURTHER RESOLVED that the Royal Oak LCC Committee recommends that the request of "SPACE" and /or Murrary Hodgson to operate the Royal Oak Music Theater, 318 West Fourth Street, be denied; and
>
> BE IT FURTHER RESOLVED that the Royal Oak LCC Committee recommends that the proposed plan of operation of "SPACE" and/or Murrary Hodgson be denied.

(Def.s' Mot. for Summ. J. at Ex. 18 (City LCC's Minutes 09/11/03) at 3.)

[11] In a hearing before this Court, on April 12, 2005, Plaintiffs clarified that this is the only action Defendants took that violated Plaintiffs' procedural due process rights. (Apr. 12, 2005, Hearing Re: Def.s' Mot. for Summ. J.)

In their briefs Plaintiffs make other vague and unclear procedural due process arguments including "the approval of the revised plan of operation provided the City only [sic] limited discretion to approve it (since it already had approved a nearly identical plan previously)." (Pl.s' Resp. at 18.) These arguments fail to even attempt to demonstrate a property right in a particular procedure. Moreover, Plaintiffs acknowledge they did get a chance to speak on the plan of operation. Thus, I do not address these claims as they are facially unintelligible and/or inapplicable.

interpret the resolution's language "the request of 'SPACE' and /or Murrary Hodgson to operate the Royal Oak Music Theater, 318 West Fourth Street, be denied" as a total prohibition on Hodgson to operate the Theater "in any way," as Plaintiffs claim, is unreasonable. (Def.s' Mot. for Summ. J. at Ex. 18 at 3.) Defendants' course of conduct clearly demonstrates that the committee did not deny Hodgson a right to operate the Theater "in any way," since Defendants actually approved three different plans of operation subsequent to the passage of the September 11, 2003, resolution. (Def.s' Mot. for Summ. J. at Ex. 21 (City's LCC Minutes) at 9, Ex. 23 (City's LCC Minutes) at 5, Ex. 26 (City Clerk's Certification).)

Plaintiffs do not state a procedural due process claim upon which relief can be granted, and I therefore GRANT Defendants' motion for summary judgment for these procedural due process claims.

3. First Amendment

Plaintiffs also allege that Defendants violated Plaintiffs' First Amendment rights by meeting "in secret to change the minutes of the July 15, 2003 meeting [...] without allowing the Plaintiffs the opportunity to participate or speak freely."[12] (Pl.s' Resp. at 23.) Specifically, Plaintiffs claim that Defendants retaliated against Plaintiffs for exercising their First Amendment rights. (Pl.s' Resp. at 23.) The Sixth Circuit in Hilderbrand v. Bd. of Tr. of Michigan State Univ., 662 F.2d 439 (6th Cir. 1981), set forth the proper approach for a First Amendment retaliation claim. Plaintiffs neither demonstrate or even recognize the rudimentary elements of this type of claim. (Pl.s' Resp. at 22-4.) A plaintiff alleging

[12] Plaintiffs make other allegations of a "violation of their First Amendment rights." (Pl.s' Resp. at 22-3.) However, these claims are not remotely related to Plaintiffs' First Amendment rights. Rather, Plaintiffs' other claims are properly classified as a either a state law defamation action, which I do not need to address, or a procedural due process claim, which I have already addressed above.

a First Amendment retaliation claim, first must set forth whether a plaintiff's conduct deserves constitutional protection.[13] Hilderbrand, 662 F.2d at 442. As stated above, Plaintiffs had no constitutional protection "to participate or speak[,]" at these meetings, therefore, Plaintiffs are unable to demonstrate the first element of a First Amendment retaliation claim. Additionally, Plaintiffs do not even attempt to present evidence that they had a constitutional right to participate at meetings.[14] In any event, Plaintiffs admit that Defendants granted Plaintiffs a right to both participate and speak at these meetings.[15] (Pl.s' Resp. at 6-7.) Given that Plaintiffs admit that they participated and spoke at these meetings, Defendants did not deny Plaintiffs their alleged right "to participate or speak." Plaintiffs do not establish a First Amendment claim; they fail to establish either a constitutionally protected right or any retaliatory conduct. Plaintiffs present no plausible evidence of any claim under the First Amendment.

Thus, I GRANT Defendants' motion for summary judgment for this First Amendment claim.

III. CONCLUSION

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[13] If a plaintiff can demonstrate that her conduct deserves constitutional protection, then a finder of fact must determine whether the action taken was due to the plaintiff's protected conduct. Hilderbrand, 662 F.2d at 443. The plaintiff's conduct must be a "substantial factor" or a "motivating factor" in the defendant's decision. Id. at 443. Finally, the defendant bears the burden of showing that the defendant's activity would have occurred absent the protected conduct. Id. at 443.

[14] Plaintiffs assert that "they were engaged in a constitutionally protected activity," however this statement is not linked to any facts or legal citations to explain or describe the "constitutionally protected activity" in which Plaintiffs were actively engaged. (Pl.s' Resp. at 23.)

[15] Plaintiffs also inconsistently contend that Defendants improperly characterize Plaintiffs' First Amendment violation claims as relating to an opportunity to speak at public meetings. (Pl.s' Resp. at 22.) Plaintiffs actually state that whether Plaintiffs' were "given ample time to speak at public meetings [...] is not the crux of plaintiffs' claims [...]." Id. at 22.

For the reasons stated above, I GRANT Defendants' motion for summary judgment on Plaintiffs' federal claims. Furthermore, Plaintiffs are unable to show any plausible evidence to support a basic First Amendment retaliation claim.

I REMAND the state claims to Oakland County Circuit Court.

IT IS SO ORDERED.

/s/John Feikens
John Feikens
United States District Judge

Date: 4/14/2005